

SOUTH AFRICA / JUDGMENT

# Lakay v S (A 724/2010) [2012] ZAWCHC 14;

## 2012 (2) SACR 399 (WCC) (2 March 2012)

[2012] ZAWCHC 14

## COURT

Western Cape High Court, Cape Town

## BEFORE

N J Yekiso, J I Cloete

## CASE / FILE NUMBER

A 724/2010

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IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE  
TOWN)

Case no: A 724/2010

JASON LAKAY

.....Appellant

v

THE STATE

.....Respondent

FOR

## THE APPLICANT :

MR J K JAMALIE  
INSTRUCTED  
BY  
:  
JAMALIE  
ATTORNEYS (021-6335154)  
FOR

## THE RESPONDENT :

ADVE. KORTJE (021-4877261)  
INSTRUCTED  
BY  
:  
STATE  
ATTORNEYS

## HEARD:

2 MARCH 2012

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COURT: JUDGE N J YEKISO ET ACTING JUDGE J I CLOETE  
DELIVERED: 2 MARCH 2012

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## JUDGMENT

CLOETE AJ:

- [1] The appellant (who was 16 years old and legally represented) was convicted on 12 February 2009 in the Cape Town Regional Court on one count of murder. On 3 April 2009 he was sentenced to 10 years direct imprisonment of which 4 years were conditionally suspended for 5 years. With the leave of the trial court he appeals against both his conviction and sentence.
- [2] The state's case was that the appellant murdered the deceased (then 15 years old) in Wale Street, Cape Town on the evening of 2 December 2007. It was common cause that the deceased suffered a fatal single stab wound to the chest. It was also common cause that on the evening in question the appellant, who had been present in the same area, suffered multiple stab wounds which resulted in him being hospitalised for a period of two weeks. It was during this period that he was arrested. The only issue in dispute was whether it was the appellant who had stabbed the deceased.
- [3] Only two witnesses gave evidence, namely the state's witness Alfonso Poggenpoel ('Poggenpoel') and the appellant in his own defence.
- [4] Poggenpoel testified that he had accompanied the deceased to watch the annual event of the Christmas lights being switched on in the city centre. They were standing on the corner of Wale and Adderley Streets, opposite the entrance to the Company Gardens, waiting for friends to join them. Poggenpoel saw a group of gangsters, the Stupa Boys, walking towards Adderley Street from the opposite side of the road. Two of the group, one of whom was the appellant, approached Poggenpoel and the deceased. Poggenpoel saw the appellant take his hand out of his pocket, grab the deceased, and stab him in the chest. The deceased collapsed. As Poggenpoel moved away he saw the appellant's companion kick the deceased.
- [5] It was at that stage that Poggenpoel's friends emerged from the entrance to the Company Gardens. He told them what had happened. Some of these friends pursued the appellant and his companion. They caught the appellant just outside St George's Cathedral and during the scuffle which ensued the appellant was stabbed.

- [6] Poggenpoel said that he knew that the appellant was a member of the Stupa Boys and that they had previously attempted to attack the deceased. They had also vandalised the deceased's home. Poggenpoel said that while in the company of the deceased he had previously encountered the appellant and his gangster friends outside a shopping centre in Bonteheuwel. He said that they looked dangerous and that he and the deceased thus decided to leave the shopping centre.
- [7] The appellant gave an entirely different account of the events of 2 December 2007. He claimed that he had been standing with an acquaintance, Mischa, near the entrance to the Company Gardens when a group (including the deceased) walked past them. Four of the group (again including the deceased) turned back, saying 'Daar is die Stupa Boy'. The deceased and one Taliban then attacked the appellant with a knife, and he ran. An unknown woman approached and the group dispersed. It was this woman who had taken him to hospital. He denied having stabbed the deceased. He claimed that Poggenpoel (and the deceased) could not previously have encountered him outside the shopping centre although he conceded that he did stand there sometimes to smoke since smoking was not permitted inside the premises.
- [8] In evaluating the evidence the magistrate correctly took into account the applicable legal principles, in particular those pertaining to the testimony of a single witness upon whose evidence the state's case rested to prove the guilt of the appellant beyond a reasonable doubt.
- [9] The magistrate found Poggenpoel's evidence to be truthful and commented favourably on him as a witness. He referred to Poggenpoel's uncontested evidence that the area where the deceased was stabbed was sufficiently well lit so as to have enabled him to identify the perpetrator. He correctly found that on Poggenpoel's version he had also had sufficient opportunity to identify the perpetrator during the stabbing. Not only had Poggenpoel been standing next to the deceased when he was stabbed, but he had also had the opportunity to observe, unobstructed, the appellant and his companion crossing the road towards them. The appellant could not deny Poggenpoel's evidence that he had previously observed him outside the shopping centre in Bonteheuwel. He also conceded that some of his friends were members of the gang that Poggenpoel claimed he had seen outside the shopping centre.
- [10] Furthermore, Poggenpoel readily volunteered that he himself was a member of a gang and that it was his friends who had chased the appellant and stabbed him outside St George's Cathedral. He candidly expressed regret that he had not had a weapon at the time since he would have had no hesitation in using it on the appellant in order to defend the deceased. The magistrate correctly observed that in cross-examination Poggenpoel stuck to his version. He found that Poggenpoel's evidence as a whole was substantially satisfactory in relation to all material aspects: *S v Jones* 2004 (1) SACR 420 (C) at 427g-h.

- [11] On the other hand the magistrate had serious difficulties with the appellant's version. The appellant claimed that he had been attacked for no reason by the deceased and his friends. He knew the deceased as he had previously been a member of his father's 'Klopse' band. He said that there was no bad blood between them. He could not provide an explanation as to why in these circumstances the deceased and his friends might have wanted to attack him.
- [12] Although the magistrate did not specifically deal with this in his judgment there was no explanation provided by the appellant as to why he did not call Mischa to testify in his defence. On his version she was an eyewitness to his attack. In addition it was put to Poggenpoel during cross-examination that the appellant did not suggest that the deceased was one of the group that had attacked him. However during his evidence the appellant indeed claimed that the deceased had stabbed him. He then said that when he was stabbed he was facing away from his attackers and he thus could not see who it was who had stabbed him. There were other

contradictions in the appellant's evidence but these, together with those highlighted by the magistrate, appear to be the most material.

- [13] It is against this background that the magistrate correctly accepted Poggenpoel's evidence and rejected the evidence of the appellant as not being reasonably possibly true. The conviction of the appellant was based on a proper consideration of the whole body of evidence, and I am satisfied that the magistrate evaluated the evidence correctly in light of the applicable law and arrived at the correct conclusion. He had the benefit of observing the witnesses and their demeanour. He was steeped in the atmosphere of the trial. It has not been demonstrated that the magistrate's findings are incorrect. There is thus no basis for this court to set aside the conviction.
- [14] I now turn to the sentence. The appellant was sentenced prior to the commencement on 1 April 2010 of the Child Justice Act No 75 of 2008 ('the Act'). In terms of section 4 thereof it applies *inter alia* to any person in the Republic of South Africa who is alleged to have committed an offence and was arrested whilst under the age of 18 years. The appellant was born on 16 November 1992 and was thus 15 years old when he committed the offence. As I have said he was subsequently arrested.
- [15] Chapter 10 of the Act deals comprehensively with the sentencing of children. Section 68 provides that a court must, after convicting a child, impose a sentence in accordance with that Chapter. Section 69 details the objectives of sentencing and the factors to be considered. In addition to any other considerations relating to sentencing, the objectives are to: (a) encourage the child to understand the implications of and be accountable for the harm caused; (b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society; (c) promote the re-integration of the child into the family and community; (d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of re-integration; and (e) use imprisonment only as a measure of last resort

and only for the shortest appropriate period of time.

- [16] The last objective is also to be found in s 28(1)(g) of the Constitution of the Republic of South Africa which provides that every child has the right not to be detained except as a measure of last resort and then only for the shortest appropriate period of time. This is also echoed in s 77 of the Act which provides that when sentencing a child who is 14 years or older at that time, a court must do so only as a measure of last resort and for the shortest appropriate period of time. Section 77(3) provides that a child of 14 years or older may only be sentenced to imprisonment if he or she is convicted inter alia of an offence referred to in Schedule 3 of the Act. Schedule 3 includes the offence of murder. Section 77(6) provides that in compliance with South Africa's international obligations, no law or sentence of imprisonment imposed on a child may directly or indirectly deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment.
- [17] Section 69(4) of the Act stipulates that when considering the imposition of a sentence involving imprisonment in terms of s 77, the court must take the following factors into account, namely: (a) the seriousness of the offence; (b) the protection of the community; (c) the severity of the impact of the offence on the victim; (d) the previous failure of the child to respond to non-residential alternatives, if applicable; and
- (e) the desirability of keeping the child out of prison. Section 71 makes it obligatory (save in certain limited circumstances which do not apply here) for the furnishing of a pre-sentence report by a probation officer. Section 71(4) provides that a court may impose a sentence other than that recommended in the pre-sentence report but must, in that event, enter the reasons for the imposition of a different sentence on the record of the proceedings.
- [18] In sentencing the appellant to an effective 6 years direct imprisonment, the magistrate reasoned as follows. The offence was indeed serious. Of concern was the trend of ever-younger offenders being convicted of offences of this nature. The 15 year old victim was deprived of the life which lay ahead of him. His death had a severe impact on his family. In fact his girlfriend had been pregnant at the time and subsequently gave birth. That child would now have to be raised without a father. The community was tired of violence. The offence itself was callous and the appellant showed no remorse. The appellant's father who testified in mitigation on his behalf had conceded that he had not been aware that the appellant had been a tik user before he was arrested and sent to a rehabilitation centre. The magistrate agreed with the probation officer that sentencing the appellant to compulsory residence in a child and youth care centre was not a feasible option since according to the probation officer it is a common occurrence that these children run away during the period of their residence. The appellant's father, who appeared to be his only positive role model, was not aware of the appellant's nefarious activities. The magistrate concluded that the best sentencing option would be direct imprisonment in a prison for juvenile offenders, apparently in order to afford the appellant the opportunity to rehabilitate in an environment of strong discipline and to further his education. That portion of the sentence which was suspended would hang like the sword of Damocles over his head and would thus have

deterrent effect.

- [19] It is trite that the circumstances in which a court of appeal may interfere in a sentence which another court has passed are limited. There must be either a material misdirection by the trial court, or the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking, startling or disturbingly inappropriate': *S v Malgas* 2001 (1) SACR 469 (SCA) at 478d-g.
- [20] The appellant's sentence is essentially attacked on the basis that the magistrate misdirected himself by following the recommendation of the probation officer (who had recommended direct imprisonment) without subjecting that recommendation to sufficient critical analysis. The appellant submits that the magistrate should have established what rehabilitation programs under correctional supervision were available to the appellant as an alternative to direct imprisonment.
- [21] I have certain fundamental difficulties with the magistrate's approach. Section 28(1)(g) of the Constitution formed part of the supreme law of our country when the appellant was sentenced, even if the Child Justice Act had not yet been implemented. The magistrate appeared to accept at face value the probation officer's concern about the placement of the appellant at a child and youth care centre. The probation officer had formed the view that there was a risk that the appellant might abscond from such a centre. However, in her report, she commented that the appellant had successfully completed his term of rehabilitation after having been arrested for possession of tik. The probation officer had obtained independent confirmation from the chief co-ordinator at the rehabilitation centre concerned that the appellant had duly attended and completed his rehabilitation. She also commented that according to the appellant he had remained drug free since then. There was also insufficient information placed before the magistrate to enable him to determine: (a) a realistic waiting period for admission to such a centre; and (b) whether the appellant (as opposed to other youth offenders) was likely to abscond.
- [22] Of further concern is that according to the probation officer the appellant's school had confirmed that his father was a positive role model in his life and that he provided the necessary support to the appellant in the furtherance of his education. It is not suggested that the appellant was a model student by any means – indeed, having regard to his background and social circumstances which were referred to in some detail by the probation officer, it would have been quite exceptional if he was. The point however is that the probation officer never interviewed the appellant's father, claiming that she could not make contact with him. This is difficult to accept bearing in mind that he lived a short distance away from the appellant and testified in mitigation after the probation officer had given her evidence. The magistrate voiced his concern that the appellant's father did not appear to be fully aware of his son's activities. However the uncontested evidence of the appellant's father was that

although he saw the appellant daily, these interactions were always for a brief period away from the appellant's home since he was not welcome at his former wife's home where the appellant lived.

- [23] It is also clear that the appellant was provided with little if no structure, routine and nurturing in his home environment. Although the appellant's father was unemployed he testified (and this evidence was not contested) that his current wife is employed and supports the family and that the appellant would be able to live with them in the event of a sentence such as correctional supervision being imposed. This did not appear to weigh with the magistrate who was more concerned, by all accounts, about the appellant's father's ability to discipline him.
- [24] In my view the magistrate failed to properly consider all other sentencing options available for the appellant. He should also have agreed to the request by the appellant's legal representative to further postpone the matter in order to obtain a correctional supervision report. In response to that request the magistrate replied '...the thing about the report is it cannot come with a different recommendation. It can only come with information to indicate whether he is a suitable candidate for correctional supervision...If I look at the information contained in Ms Wood's report (i.e. the probation officer) it looks like there is quite a lot of stability in his life and his circumstances and certainly from that point of view he would probably be regarded as a suitable candidate for correctional supervision. However, the question will be whether correctional supervision will be a suitable sentence, given the gravity of the offence and given all the other circumstances that we are very much aware of. So I am reluctant at this stage to order that a further report be compiled. I believe that I have enough information at hand to make a decision regarding sentence...based on the information I have at hand, I am satisfied with the...probation officer's report.' Although the magistrate did indicate that he would afford the appellant's legal representative a further opportunity to place argument before him in this regard, the issue of a correctional supervision report was not raised again by either the magistrate or the appellant's legal representative.
- [25] Of further concern is the probation officer's view as expressed in her evidence that she considered a sentence of correctional supervision to be a 'light punishment'. When pressed for an explanation by the appellant's legal representative she explained that what concerned her was the seriousness of the offence and that in her view the appellant showed no insight into his actions and the consequences thereof.
- [26] Our courts have stressed on numerous occasions that judicial officers should not hesitate, in appropriate cases, to make use of correctional supervision. It has already been imposed for very serious crimes including murder: *S v Booysen* 1993 (1) SACR 698 (A); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Kleynhans* 1994 (1) SACR 195 (O); and *S v Ingram* 1995 (1) SACR 1 (A). In all of these cases the perpetrators were adults.
- [27] In *S v E* 1992 (2) SACR 625 (A) at 633a-b Howie AJA (as he then was) said:

‘What is clear is that correctional supervision is no lenient alternative. It can, depending on the circumstances, involve an exacting regime, even virtual house arrest. Its advantage is that it is geared to punish and rehabilitate the offender within the community, leaving his work and domestic routines intact, and without the obvious negative influences of prison. It can also involve specific

rehabilitative treatment and community service.’

[28] In *S v Schutte* 1995 (1) SACR 344 (C) at 349d-g Steyn J, referring to the unreported judgment of Conradie J in *S v Harding* quoted a portion of that judgment as follows:

‘...correctional supervision is not a soft sentence...in some ways it is harder than imprisonment. A cynic once said that the easiest life on earth is being a soldier or a nun: you only have to obey orders. Prison is like that. A model prisoner is the one who best obeys orders. These are not ideal circumstances, generally, for the regrowth of character. Correctional supervision gives an offender greater scope for regrowth of character. It takes a great deal of restraint and determination on the part of a probationer. It can be very stressful. A probationer does not have his freedom – far from it – but he is not cut off from the community altogether. His support systems are not destroyed and in this way rehabilitation prospects are enhanced.’

[29] In the present matter the appellant was, to all intents and purposes, a first offender. It was not disputed that he had successfully completed his period of rehabilitation for possession of tik. His father is a positive role model in his life and his uncontested evidence was that if the appellant came to live with him he would be able to provide the necessary support structure. These factors alone should have caused the magistrate to consider the report and evidence of the probation officer with more circumspection. They should also have caused the magistrate to critically analyse all other available sentencing options. That he did not do so resulted in him imposing a sentence which was not a measure of last resort, nor was it incarceration for the shortest appropriate period of time.

[30] The magistrate materially misdirected himself in this respect. This court is thus entitled to interfere with the sentence imposed.

[31] In the result I propose the following order:

1. The appeal against conviction is dismissed and the conviction is confirmed.
2. The sentence imposed on the appellant is set aside.
3. The matter is remitted to the trial court to call for a correctional supervision report in terms of section 276(1)(b) of the Criminal Procedure Act, 51 of 1977.
4. After considering the report contemplated in paragraph 3 of this order, the trial court shall deal further with the matter in accordance with justice.
5. It is ordered that the appellant be released on bail in an amount of R500.00 on the following conditions:

- (a) That the appellant reports at the office of the Regional Court Control Prosecutor, Regional Court, Cape Town within seven (7) days of his release on bail to be apprised of the date of his court appearance.
- (b) To attend court on all such days to which the matter will be postponed until the matter shall finally be dealt with as contemplated in paragraph 4 of this order.

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J I CLOETE

I agree. It is so ordered.

N J YEKISO

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